IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BURLEY D. TOMPKINS,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

/

No. 2:12-CV-1481-CMK

MEMORANDUM OPINION AND ORDER

Plaintiff brings this civil action under the Federal Employers Liability Act, 45 U.S.C. §§ 51, et seq. Pursuant to the written consent of all parties, this case is before the undersigned as the presiding judge for all purposes, including entry of final judgment. See 28 U.S.C. § 636(c). Pending before the court is defendant's motion for summary adjudication (Doc. 53). The parties appeared for a hearing on May 27, 2015, at 10:00 a.m., before the undersigned in Redding, California. Anthony S. Petru, Esq., appeared for plaintiff. Stephanie Quinn, Esq.,

/ / /

/ / /

/ / /

Dockets.Justia.com

appeared for defendant. After hearing the parties' arguments, the matter was submitted.[1]

I. BACKGROUND

This action proceeds on the first amended complaint (Doc. 17). On the seven claims raised, six remain following the court's March 8, 2013, order (Doc. 22) dismissing plaintiff's second claim for violation of 49 C.F.R. § 225.33 with prejudice. In the current motion for summary adjudication, defendant seeks judgment as a matter of law on plaintiff's first claim for negligence. As to this claim, the court recited the following summary in its March 8, 2013, order:

> Plaintiff alleges that in or about August through October 1998, he was working for Defendant at Defendant's Oroville yard near Oroville, California. During work, a trespasser startled him while he was releasing the handbrakes of an open-top gondola car. As a result, he fell from the railcar and sustained a back injury.
>
> Plaintiff further alleges that he timely reported his back injury to Defendant's Manager, Marvin Dunn, who harassed, intimidated, and threatened Plaintiff in order to discourage and prevent Plaintiff from timely filing an on-duty injury claim and seeking proper medical treatment. In addition, throughout his employment with Defendant, Plaintiff allegedly endured ongoing express and implied threats by railroad management to terminate him if he filed an on-duty injury report. . . .

/ / /

/ / /

/ / /

---

[1] At the hearing, plaintiff's counsel sought to introduce documents into evidence which had not previously been made a part of the record. The day after the hearing, plaintiff's counsel submitted a document entitled "Plaintiff's Supplemental Authorities and Evidence in Opposition to Union Pacific Railroad Company's Motion for Partial Summary Judgment." Plaintiff's counsel states: "Plaintiff seeks direction from the court as to how best to file these documents. . . ." As defendant notes, however, no direction from the court is necessary beyond the procedures set forth in the parties' stipulated protective order (Doc. 52) governing the documents at issue. Specifically, the protective order provides that protected documents may only be filed under seal pursuant to a court order under Eastern District of California Local Rule 141. Because plaintiff has not complied with Local Rule 141 with respect to filing protected documents under seal, the documents referenced in counsel's "Supplemental Authorities" are not part of the record on the instant motion.

Defendant's argument that plaintiff's first claim for negligence is time-barred was rejected on an equitable estoppel theory. Specifically, the court concluded:

> • Plaintiff's allegations regarding retaliatory statements, such as threats and intimidations, are sufficient to invoke equitable estoppel.
>
> • Plaintiff has sufficiently alleged facts to show reasonable reliance.
>
> • The purposes of the statute of limitations are satisfied notwithstanding the delay in filing suit.

II. STANDARD FOR SUMMARY JUDGMENT/ADJUDICATION

The Federal Rules of Civil Procedure provide for summary judgment or summary adjudication when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The standard for summary judgment and summary adjudication is the same. See Fed. R. Civ. P. 56(a), 56(c); see also Mora v. ChemTronics, 16 F. Supp. 2d. 1192, 1200 (S.D. Cal. 1998). One of the principal purposes of Rule 56 is to dispose of factually unsupported claims or defenses. See Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Under summary judgment practice, the moving party

> . . . always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.
>
> Id., at 323 (quoting former Fed. R. Civ. P. 56(c)); see also Fed. R. Civ. P. 56(c)(1).

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the

allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. See Fed. R. Civ. P. 56(c)(1); see also Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987). To demonstrate that an issue is genuine, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted). It is sufficient that "the claimed factual dispute be shown to require a trier of fact to resolve the parties' differing versions of the truth at trial." T.W. Elec. Serv., 809 F.2d at 631.

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. See Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed, see Anderson, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, see Matsushita, 475 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987). Ultimately, "[b]efore the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." Anderson, 477 U.S. at 251.

III. DISCUSSION

Defendant moves for summary adjudication arguing that the undisputed evidence obtained through discovery now shows that, despite plaintiff's allegations, equitable estoppel does not apply and the claim is time-barred. According to defendant:

> Plaintiff's claim survived the pleading stage because he pled an estoppel theory, yet after months of discovery, it is clear that Plaintiff's estoppel theory has absolutely no merit. He admits that he was not aware of any of the alleged intimidation of other employees until after the limitations period had expired. He knew he had a work-related injury, he knew he had three (3) years to file suit, and he sat on his rights for fourteen (14) years. These are not the circumstances under which the law protects him from application of the statute of limitations.

Defendant also argues that, even if the statute of limitations does not bar plaintiff's claim, defendant is still entitled to judgment as a matter of law because plaintiff cannot prove the essential elements under FELA. According to defendant:

> . . .The undisputed facts demonstrate that UPRR acted reasonably to control trespassing on its property through education, training, and police activities by its own police force. After months of discovery, it is clear that Plaintiff does not have any *competent* evidence that could lead a reasonable jury to conclude that Defendant knew or should have known of a risk of injury to its employees from trespassers in Oroville. Plaintiff and his "expert" cannot even say that the trespasser got on the train in Oroville and therefore, his anecdotal evidence of an alleged trespasser problem in the Oroville yard carries no weight. No reasonable jury could conclude that in 1998, UPRR failed to reasonably address known risks to its employees like Plaintiff and failed to provide him with a reasonably safe workplace.

A. Equitable Estoppel

In his opposition, plaintiff cites Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 235 (1959), for the issue of application of equitable estoppel in a FELA case is triable to a jury as of right. Plaintiff, however, misreads Glus. In that case, the Supreme Court considered whether a district court properly dismissed a FELA claim as time-barred. The Court held that the plaintiff's complaint contained sufficient allegations to invoke equitable estoppel and that "[w]hether [the plaintiff] can in fact make out a case calling for application of the

doctrine of estoppel must await trial." Id. Thus, in stating that the issue "must await trial," the Court was observing that, where the allegations in the complaint are sufficient, "[s]uch questions [of fact] cannot be decided at this stage [dismissal] of the proceedings." Id. The Court did not specifically hold that where, as defendant argues is the case here, a FELA plaintiff cannot prove the underlying factual issues relating to estoppel, summary judgment would be inappropriate.

This reading of Glus is consistent with the Ninth Circuit's holding in Santa Maria v. Pac. Bell, 202 F.3d 1170 (9th Cir. 2000), cited by both parties in this case. In Santa Maria, the district court denied the defendant's motion for summary judgment, rejecting its argument that the plaintiff's EEOC complaint was time barred based on application of the doctrine of equitable estoppel. See id. After a jury returned a verdict in favor of the plaintiff, the defendant appealed. The Ninth Circuit reversed the district court's denial of summary judgment on the equitable estoppel issue, vacated the jury's judgment, and remanded with instructions to enter judgment in favor of the defendant. See id. Thus, a district court may decide on summary judgment that, as a matter of law based on undisputed facts, equitable estoppel does not apply.[2]

In the March 8, 2013, order finding that equitable estoppel applied at the pleading stage based on plaintiff's allegations, the court stated:

> Equitable estoppel focuses on the defendant's affirmative actions that prevent a plaintiff from filing a suit. Keenan v. BNSF Ry. Co., C07-130BHS, 2008 WL 2434107, at *6 (W.D. Wash., June 12, 2008). To determine whether equitable estoppel applies, courts consider several factors, "such as whether the plaintiff actually relied on the defendant's representations, whether such reliance was reasonable, whether there is evidence that the defendant's purpose was improper, whether the defendant had actual or constructive knowledge that its conduct was deceptive, and whether the purposes of the statute of limitations have been satisfied." Id. (citing Santa Maria v. Pacific Bell, 202 F.3d 1170, 1177 (9th Cir. 2000)). Defendant argues that estoppel is not appropriate in this case because (a) retaliatory statements are not sufficient for equitable relief from the statute of limitations, (b) the facts alleged to not establish Plaintiff's reasonable reliance, and (c) the facts alleged do not show that the purpose of the statue of limitations has been satisfied.

[2] Though Santa Maria involved an EEOC claim, there is nothing about a claim under FELA which would distinguish the holding from this case.

In the current motion, defendant recasts these arguments in light of the evidence obtained through discovery. Specifically, defendant argues: (1) as a matter of law, threats of retaliation are insufficient to form a basis for equitable estoppel; (2) plaintiff cannot prove that he reasonably relied on any representations by defendant; and (3) plaintiff cannot prove any improper purpose on the part of defendant.

1. Threats of Retaliation

This argument has already been rejected by the court. In the March 8, 2013, order, the court noted two cases in which threats of retaliation were considered on the merits. In Longo v. Pittsburgh & L.E.R.Co, New York Cent. Sys., 355 F.2d 443, 444 (3d Cir. 1966), the defendant allegedly told the plaintiff that he would lose his job if he filed a suit against the company. The Third Circuit reversed the district court's dismissal based on the statute of limitations, concluding that the evidentiary record revealed a triable issue of fact on whether the defendant's own conduct precluded application of the statute of limitations. See id. at 445. Similarly, in George v. Hillman Transp. Co., 340 F. Supp. 296, 299 (W.D. Pa. 1972), the court considered whether the plaintiff's fear of losing her employment could form the basis for equitable estoppel, but concluded that it did not because there was no evidence that her fear was induced by any conduct of the defendant. Accord Johnson v. Henderson, 314 F.3d 409, 416 (9th Cir. 2002) (holding that "there is no evidence in the record to suggest that the reason [plaintiff] missed the deadline here – by six months – was *because of* what the supervisor said to her").

2. Reasonable Reliance

As the cases cited above demonstrate, while threats of retaliation can theoretically form the basis for equitable estoppel, plaintiff must have evidence that he reasonably relied on such threats and, as a result, did not file suit. In essence, defendant argues in the current motion that plaintiff cannot prove that he was ever threatened with retaliation because the only evidence plaintiff has produced relates to accounts – some of which from times after the limitations period in this case expired – of others who may have received retaliatory threats for submitting an injury

report. In making this argument, defendant relies on excerpts from plaintiff's December 18, 2014, deposition. According to defendant, plaintiff admitted the following: (1) prior to the 1998 incident, plaintiff never heard that he would be terminated for turning in an injury report; and (2) the only time plaintiff ever heard of threats of retaliation for turning in an injury report was sometime in 2006 or 2007 – after the 3-year limitations period would have expired.

Defendant's reliance on plaintiff's lack of knowledge prior to the 1998 incident of potential retaliation for turning in an injury report is misplaced. The question is whether threats of retaliation reasonably caused plaintiff not to file suit within the 3-year limitations period. Thus, the relevant timeframe of plaintiff's knowledge extends three years after the injury. Defendant's own brief, as well as plaintiff's deposition, reflect that, just after the 1998 incident, plaintiff was warned by another employee that he could be terminated for turning in an injury report.[3] A jury could reasonably infer from this that turning in an injury report could result in retaliatory termination and that plaintiff was aware of this within the timeframe such knowledge could have affected his ability to file suit on time.[4]

While plaintiff's statements may be inconsistent, that is a question of the weight to be given plaintiff's testimony, which can only be decided by a jury.

/ / /

/ / /

/ / /

---

[3] The hearsay rule would not apply to exclude this testimony because it would not be offered for the truth of the matter stated – that defendant did not did not threaten retaliation – but for the effect the statement had on plaintiff, i.e., that the statement created a reasonable fear of retaliation for submitting an injury report.

[4] Defendant unpersuasively argues that estoppel can only apply if the employer threatens retaliation for filing a FELA suit, as opposed to simply an injury report. Defendant, however, cites no authority in support of this distinction and a jury could reasonably infer that, if an employer would retaliate for submitting an injury report it would certainly do the same for filing a lawsuit against it. The court does not accept defendant's interpretation, which would allow an employer to escape equitable estoppel so long as its threats of retaliation are not directed towards filing a formal FELA complaint in district court.

B. Liability Under FELA

Under FELA, a railroad employee may recover for workplace injury resulting from the negligence of the employer railroad. See 45 U.S.C. § 51. As an alternative basis for summary adjudication of plaintiff's first claim, defendant argues that, as a matter of law, it was not negligent. Defendant argues:

> Here, Plaintiff seeks to impose liability on UPRR for the acts of a third party [the trespasser] in startling him. He seeks to impose a duty on UPRR to not only fence its property, but to control the acts of third parties on property that is not even owned or controlled by Defendant. Plaintiff's claim fails as a matter of law because no such duty can be imposed, there is no evidence UPRR breached any duty, the incident alleged is not reasonably foreseeable, and no negligence on the part of Defendant was a cause of injury to Plaintiff.

1. Duty

Defendant argues that it had no duty to prevent trespassing on property it did not control. Plaintiff, however, alleges that he sustained the 1998 injury after being startled by a trespasser who was on defendant's train located on defendant's Oroville yard. Defendant has not presented any authority supporting the position that it did not owe a duty to prevent trespassers on its own property.

2. Foreseeability

Defendant argues that plaintiff's evidence does not go beyond evidence of ambient crime and is insufficient to put defendant on notice. According to defendant, the best plaintiff can do is show that trespassers were, at times, on railroad property. Defendant contends that this evidence does not make it foreseeable that a trespasser would hide under a tarp on a train. Defendant states:

> There is simply no evidence to demonstrate that UPRR failed to provide Plaintiff with a reasonably safe place to work. Without a history of injuries to persons like Plaintiff from trespassers in the vicinity where Plaintiff says he was hurt, no triable issue of material fact is left for the jury to decide on Plaintiff's First Cause of Action. . . .

/ / /

In support of its argument, defendant relies on two out-of-circuit cases. In Thomas v. Consolidated Rail Corp., 971 F. Supp. 620 (D. Mass. 1997), the plaintiff was injured when a trespasser riding an ATV on the railroad's property kicked up rocks causing injury to the plaintiff. The court concluded that the injury was not foreseeable as a matter of law because there was no evidence of prior incidents of sufficient seriousness to put the defendant on notice. See id. At 622. In another trespasser case, Leef v. Burlington Northern and Santa Fe Ry. Co., 49 P. 36 1196 (Colo. App. 2002), the plaintiff was injured when a trespasser attempted to enter the cab of a locomotive. See id. At 1197. Again, the court concluded that the injury was not foreseeable because there was no evidence of "events at or very near the same location of plaintiff's injury. . . ." See id. at 1199.

In his opposition, plaintiff argues:

> Prior to 1998, Union Pacific had knowledge of trespassers at the Oroville yard because they had reports of incidents before Plaintiff's injury. (UF 35). Plaintiff's co-worker and later manager, Eric Bennett, recalled trespassers at Oroville yard. (UF 36, 86). Plaintiff's manager Mark Dunn admitted trespassers were a part of what went on in the railroad yard and could have been present in Oroville. (UF 37). Dunn further admitted there was a homeless camp on the east end of the yard. (UF 37). Additionally, Plaintiff had heard employees complain about trespassers. (UF 7). It was common to find trespassers on locomotives according to Dunn. (UF 38). In fact, Union Pacific's expert witness George Slaats admitted that there were approximately 24 documents incidents of trespassers in the Oroville yard in 1996 and another 14 in 1997-1998 prior to Plaintiff's injury. (UF 41). . . .

While plaintiff's evidence creates a material dispute as to whether trespassers were ever present at the Oroville yard (most certainly there were), the mere existence of trespassers without more connection to the 1998 incident – such as evidence that trespassers had been found hidden on trains – is insufficient as a matter of law because plaintiff's injury would not be foreseeable. Plaintiff states that, according to Dunn, it was common to find trespassers on locomotives. Plaintiff, however, only cites his own deposition testimony recalling what Dunn had said. Because the Dunn's out-of-court statement is being offered for the truth of the matter stated – that trespassers were common on locomotives – this evidence is barred by the hearsay

rule. Plaintiff has produced no admissible evidence of specific incidents similar to the incident in 1998 where a trespasser hid on a train.

In light of the absence of any evidence to establish that plaintiff's injury was reasonably foreseeable, the court concludes that defendant is entitled to summary adjudication on plaintiff's first claim for negligence under FELA.

IV. CONCLUSION

Accordingly, IT IS HEREBY ORDERED that defendant's motion for summary adjudication (Doc. 53) is granted.

DATED: June 24, 2015

CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE